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In the Supreme Court
OF THE
United States

OCTOBER, 1978 TERM

No. 78-432

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,
vs.
BRIAN F. WEBER, et al., *Respondents.*

No. 78-435

KAISER ALUMINUM & CHEMICAL CORPORATION, *Petitioner,*
vs.
BRIAN F. WEBER, et al., *Respondents.*

No. 78-436

UNITED STATES OF AMERICA, et al., *Petitioners,*
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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT BRIAN F. WEBER AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT BRIAN F. WEBER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT BRIAN F. WEBER

Pursuant to Rule 42, Pacific Legal Foundation moves this Court for permission to file the annexed amicus curiae brief in support of respondent Brian F. Weber. Consent to the filing of this brief has been granted by respondent Brian F. Weber and by petitioners United Steelworkers of America and Kaiser Aluminum & Chemical Corporation. Petitioner United States has withheld consent,

but has stated that it does not oppose the filing of a brief pursuant to this motion. Those consents have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Many of Pacific Legal Foundation's members, contributors, and supporters are employers or employees who have expressed concern regarding the scope of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e, *et seq.*), the issue in this case. In order to give voice to these interests, the Board of Trustees of Pacific Legal Foundation has authorized the filing of this brief.

Pacific Legal Foundation strongly believes that the decision of the Fifth Circuit Court of Appeals in this case reflects an interpretation of Title VII of the Civil Rights Act of 1964 which is both legally correct and socially sound. Congressional intent, evidenced during the debates prior to the passage of Title VII, and recent determinations of this Court both indicate that this law is to be utilized to remedy specific employment discrimination rather than to correct imbalance in an employer's work force created by factors other than the employer's discriminatory treatment. A decision contrary to that rendered by the court below would not only run counter to these legal precedents, but would also create grave problems for nonminority workers who would be compelled to forego benefits rightfully earned. Such a decision would also place employers in the position of having to devise employment programs and incentives which bear no reference to past employment activities. This decision, far from ensuring racial equality and harmony,

would greatly increase racial tension in the national work force.

Pacific Legal Foundation believes that the issue of racial equality in employment, which can be promoted by a reasoned interpretation of Title VII based on past precedent, is of utmost concern to all the citizens of our country. It also believes that, as an organization whose supporters include both workers and employers, it can present this Court with a perspective which might otherwise be absent from this case.

For the foregoing reasons, Pacific Legal Foundation requests that this motion to file the annexed amicus curiae brief be granted.

Respectfully submitted,

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INTEREST OF AMICUS

The interest of amicus is set forth in the preceding motion for leave to file this brief.

OPINION BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, is reported at 563 F.2d 216 (5th Cir. 1977).

STATEMENT OF THE CASE

In 1974, Kaiser Aluminum & Chemical Corporation (hereinafter Kaiser) and United Steelworkers of America (hereinafter United Steelworkers) entered into a collective bargaining agreement which was in part designed to increase the number of minority craft workers.[1] This agreement established an on-the-job craft training program for employees without prior craft experience and specified that admission to the program would be made on a ratio of one minority worker for every nonminority employee admitted until the percentage of minority craft workers approximated the minority population in the area of each plant. In other words, fifty percent of the available slots in the program were reserved for minority workers. While eligibility for training rested on plant seniority, in order to meet the one for one ratio, two seniority lists were established, one for minorities and one for others. The most senior applicants for the program were selected from each list. The named plaintiff in this case, Brian Weber, a nonminority worker, applied for the program and was turned down although several minority applicants with less plant seniority were selected from the minority list for participation.

Weber brought suit in United States District Court alleging that by preferring minority employees with less seniority for admission to the training program, Kaiser

[1] *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 218 (5th Cir. 1977). The percentage of minority craft workers at Kaiser's plant in Gramercy, Louisiana, the work place concerned in this suit, was less than the percentage of minority workers in the area surrounding the plant. *Weber v. Kaiser Aluminum & Chemical Corp.*, 415 F. Supp. 761, 764 (E.D. La. 1976). However, the district court found and the appellate court agreed that this imbalance was not due to Kaiser's discriminatory practices. *Weber*, 563 F.2d at 224.

and United Steelworkers had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, *et seq.* Both the district court and the Fifth Circuit Court of Appeals ruled in favor of Weber. The court of appeals approved the district court's finding that Kaiser had not been guilty of past discriminatory hiring or promotional practices at Weber's plant and held that in the absence of prior employer discrimination, the challenged program was not a remedy permissible under Title VII, but rather an unlawful racial preference prohibited by Sections 703(a) and 703(d) of that statute. *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 224 (5th Cir. 1977). Further, the court refused to accept the suggestion that the program could be sanctioned as a general attempt to correct past societal discrimination and indicated:

> "[U]nless a preference is enacted to restore employees to their rightful places within a particular employment scheme it is strictly forbidden by Title VII." *Weber*, 563 F.2d at 225.

Thus the issue to be determined in this case is whether an employer who has not been guilty of unlawful discrimination against minorities may be permitted to carry out a program which grants preferences to a minority group in general solely because of race.

It is the position of amicus curiae Pacific Legal Foundation that the court of appeals was correct in determining that the program here at issue is not permitted under Title VII. This interpretation is required if the legislative intent inherent in the passage of Title VII is to be preserved. Even more importantly, this interpretation is necessary in order that all members of the national work force

can be assured that their rights to equality in employment opportunity will be preserved.

ARGUMENT

I

KAISER'S MINORITY PREFERENCE PROGRAM VIOLATES TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

In enacting Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, Congress was concerned with achieving equal employment opportunity for all *individuals* regardless of their race, color, religion, sex, or national origin; with removing barriers which in the past have favored certain majority employees over others; and with making *individuals* whole for injuries suffered because of past unlawful employment discrimination. *Los Angeles Department of Water & Power v. Manhart*, 46 U.S.L.W. 4347 (1978); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). In order to carry out these purposes, Congress has specifically proscribed certain employment activities. Section 703(a) prohibits an employer from classifying individual employees according to race, color, religion, sex, or national origin in a manner which would adversely affect their employment status.[2] Section 703(d) prohibits either an em-

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[2]Title VII, Section 703(a), 42 U.S.C. § 2000e-2(a), in its entirety provides:

> "(a) It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or

ployer or a union from discriminating against an individual because of race, color, religion, sex, or national origin in selection for employment training programs.[3]

That these prohibitions apply to protect nonminority individuals is unquestioned. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976). However, since *McDonald*, the question has arisen whether these protections for nonminorities may be altered to some extent if an employer engages in action specifically designed to aid minority groups. Under the facts of the present case, the court of appeals held that they may not. This holding is supported by the language of Title VII, its legislative history, and decisions of this Court.

A. Kaiser's Program Was Not Designed to Remedy the Effects of Unlawful Employment Discrimination

In order to ascertain the propriety of the ruling below, it is first necessary to define precisely that "discrimination" which would allow a preferential program under Title VII. Kaiser, the United States, and the Equal Employment Opportunity Commission (hereinafter EEOC) all agree with the court of appeals that prior unlawful discrimination is

tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

[3]Title VII, Section 703(d), 42 U.S.C. § 2000e-2(d), in its entirety provides:

"(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training."

necessary before a program such as Kaiser's could be judicially upheld. However, they disagree with the court's determination that specific acts against specific employees are needed to constitute the necessary discrimination. Kaiser argues that, in the context of a racially imbalanced work force, such unlawful discrimination occurs if there exists a general history of specific wrongs against minority group workers. Kaiser's Brief for Petitioner (hereinafter Kaiser Brief) at 46-49. EEOC argues that it occurs if there has been "apparent" specific discrimination against minority workers by the employer. Brief for the United States and EEOC (hereinafter EEOC Brief) at 17, 41. Both these arguments fall short of the mark. Title VII, its legislative history, and judicially established precedent make plain that without findings of specific employer actions which serve to retard a minority's progress in the work place because of his race, the employer cannot enact a program giving minorities preferences because of race.

Section 703(j) states clearly that Kaiser would not be *required* "to grant preferential treatment to any individual of a group underrepresented in its work force because of race, color, religion, sex or national origin."[4] This section's

[4]Title VII, Section 703(j), 42 U.S.C. § 2000e-2(j), in its entirety provides:

"(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any

legislative history, however, goes further to indicate that such preferential treatment is *forbidden.*

The bill which became Title VII originally did not contain Section 703(j). However, even before the inclusion of this section, Senators Case and Clark, the bill's floor managers in the Senate, filed a report declaring:

> "There is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race.
>
> "[The employer] would not be obliged or indeed, permitted—to fire whites in order to hire negroes, or to prefer negroes for future vacancies, or, once negroes are hired, to give them special seniority rights at the expense of white workers hired earlier. . . ." Interpretive Memorandum of Title VII of H. R. No. 7152, submitted jointly by Senators Clark and Case, Floor Managers, 110 Cong. Rec. 7213 (April 8, 1964).

The lower courts have generally held that Section 703(j) does not ban the use of preferential programs to change the racial composition of a work force, provided that the imbalance can be attributed to unlawful discrimination. *See Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976). Therefore, the cases which have allowed preferential

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labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

remedies in spite of Section 703(j) have included some finding of prior discrimination on the part of the entities to whom the preferential program applies. This finding of discrimination has consistently taken the form of specific activities which have adversely affected minority individuals because of their race. *See*, for example, *Rios v. Enterprise Association Steamfitters Local 638 of U.A.*, 501 F.2d 622, 634-39 (2d Cir. 1974); *United States v. International Brotherhood of Electrical Workers Local 38*, 428 F.2d 144 (6th Cir. 1970), *cert. denied*, 400 U.S. 943 (1970); *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971). It is only after findings of these specific acts of discrimination have been made that remedial action in the nature of hiring or promotion quotas may be justified.

In *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), an employee charged his employer with a Title VII violation when he was discharged due to his refusal to work certain shifts because of his religious convictions. In finding that there had been no violation, this Court indicated that if Hardison received Saturdays off, the treatment which he alleged was required under Title VII, "TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath." *Hardison*, 432 U.S. at 81. In other words, some other employee would have been penalized because he was not a member of a religious minority. The Court then continued:

> "*Title VII does not contemplate such unequal treatment.* The repeated, unequivocal emphasis of both the language and legislative history of Title VII is on elim-

inating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities." *Id.* (emphasis added).

In responding to Hardison's arguments that earlier Supreme Court cases granting some minority individuals retroactive seniority supported his claims for preferential treatment, this Court responded by distinguishing certain of those cases:

> "In Franks [*v. Bowman Transportation Co.*] we held that it was permissible to award retroactive seniority to victims of past discrimination in order to implement the *strong congressional policy of making victims of discrimination whole.* Franks is not dispositive of the present case *since here there is no evidence of past discrimination that must be remedied.*" *Hardison,* 432 U.S. at 79 n. 12 (emphasis added).

Thus *Hardison* points out two important factors in determining whether an employer's actions which aid minorities in ways which affect nonminorities, are permissible under Title VII. First a court must consider whether there has been past discrimination and second, whether the program is designed to make victims of past discrimination whole.

These two factors were considered by the court of appeals in the present case. Both the trial and appellate courts found that although there was an imbalance of minority workers at Kaiser's plant when compared to the minority population surrounding the plant, there was no evidence of specific discriminatory practices on the part of Kaiser. *Weber,* 563 F.2d at 224. The court of appeals recognized that racially based "affirmative action" plans were permissible under Title VII in order to remedy the effects of past

discrimination against specified individuals; however, since it had found no discrimination on the part of Kaiser, it ruled the company's program to be in violation of Title VII.

Support for this position may be found in *Regents of the University of California v. Bakke,* 46 U.S.L.W. 4896 (1978). Although *Bakke* did not involve Title VII, the opinions therein are instructive since that case also dealt with the implementation of preferential quota relief for minority group members in the absence of specific past discrimination against them by the entity instituting the relief. In addition, in making their determinations, the members of the Court frequently looked to Title VII precedents for guidance.

After reviewing several cases, some construing Title VII, Justice Powell concluded:

> "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." *Bakke,* 46 U.S.L.W. at 4906 (opinion of Powell, J.).

In explaining this observation, Justice Powell noted that in *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971):

> "the Court emphasized that: 'the Act [Title VII] does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group.' *Id.,* at 430-31. Indeed, § 703(j) of the Act makes it clear that preferential treatment for an individual or minority group to correct an existing 'imbalance' may not be required under Title VII, 42 U.S.C. § 2000e-2(j). Thus, Title VII principles support the proposition *that find-*

> ***ings of identified discrimination must precede the fashioning of remedial measures embodying racial classifications.*** *Bakke*, 46 U.S.L.W. at 4907, n.44 (opinion of Powell, J.) (emphasis added).

In his reference to the necessity for findings of identified discrimination, Justice Powell indicated that before a preference can be valid under Title VII, far more is required than the presence of the "apparent" or historical activities which EEOC and Kaiser postulate validate the program here at issue. Justice Powell's entire opinion indicates that he had eliminated generalized past improper actions against minorities or past underutilization as a valid basis for preferential programs. *See Bakke*, 46 U.S.L.W. at 4903, n.36. In addition, the "identified" discrimination which he emphasized is definitionally far different from "apparent" discrimination. Even were this not the case, however, Justice Powell speaks of the necessity for "findings." In the present case, there simply were no findings of discrimination made prior to the implementation of the Kaiser program. The factors which Kaiser and EEOC now mention as supporting the program appear to be no more than *post hoc* justifications. *Cf. Department of General Services v. Superior Court*, 85 Cal. App. 3d 273 (1978).

This Court's decisions in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), support the necessity for findings of specific employer activity which denied minorities equal access to employment opportunities before a racial imbalance can be considered to be unlawful discrimination. In both *Franks* and *Teamsters* the employer had been found to have engaged in specific practices which

denied minorities employment opportunities given to nonminorities. In each case the Court determined that Title VII had been violated and ordered retroactive seniority to restore discriminatees to the place they would have occupied in the employment scheme, absent illegal discrimination. The Court, however, did not hold that all minority employees or applicants who had been turned down for preferred positions be awarded the seniority automatically. Rather, it indicated that before a minority applicant for retroactive seniority was awarded this relief, the company be given an opportunity to show he was not the victim of the discrimination. *Teamsters*, 431 U.S. at 362; *Franks*, 424 U.S. at 772.

If the definition of unlawful discrimination included a racially imbalanced work force created by generalized societal or "apparent" employer action against minorities, as argued by Kaiser and EEOC, then there would have been nothing the employers in *Franks* or *Teamsters* could have shown to indicate that the minorities therein were not the victims of unlawful discrimination. The companies' work forces were clearly imbalanced racially and the minority workers had obviously been subject to the same type of historical pressures as those Kaiser argues pertained to its minorities. Further, there was far more than apparent employer activity at issue in *Franks* and *Teamsters* since it had already been determined that the companies had carried out programs antithetical to minority advancement. The Court further held in *Teamsters* that minority members who had never applied for a preferred job must show that they were victims of discrimination before they would be entitled to preferential relief. *Teamsters*, 431 U.S. at

364. The fact that this Court indicated the *Franks* and *Teamsters* minority workers were not automatically entitled to relief points to the conclusion that before there can be unlawful discrimination which Title VII can remedy, there must be a specific showing of employer action which has impeded the progress of a minority individual.

Since no such showing was made in this case, there has been no unlawful discrimination on Kaiser's part. Without this unlawful discrimination Section 703(j) prohibits an employer from preferring one racial class over another.

The underrepresentation of minority craft workers in Kaiser's work force when compared to the population surrounding the plant may be an unfortunate occurrence. However, as was noted by this Court in *United Air Lines, Inc. v. Evans,* 431 U.S. 553 (1977), not all unfortunate occurrences in the work place, even if they affect a minority group adversely, can be considered unlawful and within the purview of Title VII.

B. The Kaiser Program Was Not Designed to Aid Victims of Any Type of Discrimination

In addition to considering whether unlawful employment discrimination which can be remedied by Title VII has occurred, it is also necessary to consider whether the minorities concerned in Kaiser's program must have been victims of past discrimination before they could be given preferential treatment over nonminorities. As has been discussed above, since Kaiser had committed no unlawful discriminatory acts, preferential treatment is, *per se,* improper under Title VII. However, even under the broad definitions of discrimination advocated by Kaiser and

EEOC, Kaiser's classwide preference program is still impermissible under Title VII if Title VII requires that a remedial program direct itself to aiding specific victims of discrimination.

Title VII does more than provide for remedies for past discrimination. It also demands equality of opportunity for all individuals. This Court observed in *Los Angeles Department of Water & Power v. Manhart,* 46 U.S.L.W. at 4349:

> "The statute makes it unlawful 'to discriminate against any *individual* with respect to his compensation, terms, conditions or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin.' The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." (Emphasis in original, citation omitted.)

Under the holdings of *McDonald, supra,* and *Hardison, supra,* the individual is protected by Title VII whether he is a member of a minority or a nonminority group.

In order that a nonminority individual's right to equality of opportunity, regardless of his race, not be forgotten in a quest to fulfill the remedial purposes of Title VII, it is necessary to ensure that an employer's remedial program be focused only upon restoring discriminatees to the places they would have occupied absent discrimination. This "make whole" or "rightful place" reasoning was adopted by the court of appeals in this case. As was explained by that court, it is only under this approach that:

> "no one is being favored or disfavored, advantaged or injured, under these circumstances *because* of race;

rather, those who have been unjustly deprived receive their due and those who have been arbitrarily favored surrender some of the largesse capriciously conferred on them." *Weber,* 563 F.2d at 225.

Several decisions of this Court support the propriety of this reasoning by indicating that the scope of Title VII extends only to remedying the wrong done to the individual. In *Albemarle Paper Co. v. Moody,* 422 U.S. at 418-19, the Court held:

> "'[W]hen a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.'" (Citation omitted.)

This emphasis on individual relief for individual wrongs was reaffirmed by this Court in *Franks,* 424 U.S. at 772. There the Court recognized that minority individuals who were not victims of the employer's discriminatory policies would not be entitled to preferential relief.

In the instant case there was certainly no showing that the minority individuals to be aided by Kaiser's program had been the victims of illegal discrimination if it is to be defined as specific employer activity, since the courts below found that none had occurred. Nor was there even any showing that these persons had been actual victims of broader generalized or "apparent" policies which favored whites. Without this showing, Kaiser's program violated Title VII's requirement that individuals of all races be granted equality of opportunity; it then became a vehicle

for furthering class stereotypes which Title VII was designed to eradicate.

As this Court noted in *Manhart,* 46 U.S.L.W. at 4349, when outlawing a sex-related classification:

> "Practices which classify employees in terms of religion, race or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals [which Title VII requires]."

Here there simply was no scrutiny of individuals, neither those to be aided, nor those to be disadvantaged by the racial preference established by Kaiser. Lack of this scrutiny is not only antithetical to the individual emphasis of Title VII and violative of the rights guaranteed to all workers under the statute, it may also do a disservice to minority workers in that preferential programs not designed to remedy specific wrongs "may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection." *Bakke,* 46 U.S.L.W. at 4904 (opinion of Powell, J.).

II

JUDICIAL APPROVAL OF KAISER'S PROGRAM WOULD NOT FURTHER THE GOAL OF VOLUNTARY COMPLIANCE WITH TITLE VII NOR ENHANCE PUBLIC POLICY

Both Kaiser and EEOC argue that in enacting Title VII, Congress desired to encourage voluntary compliance with the Act and that to uphold this purpose, this Court must approve Kaiser's voluntary program. Kaiser Brief at 23-30; EEOC Brief at 29-35. Certainly it is true that voluntary compliance is preferable to actions taken only after

lengthy litigation. However, petitioners' arguments for voluntary compliance mistake the nature of that policy.

As has been shown above, an employer is allowed under Title VII to adopt a preferential program based on race only if the program meets two criteria: (1) it is based upon findings of past unlawful employment discrimination defined as specific employer activities which have retarded minority opportunity, and (2) it is designed to aid specific victims of this unlawful employment discrimination. Kaiser's program meets neither of these criteria and is thus in violation of Title VII. Therefore, approval of Kaiser's program would do nothing to further voluntary compliance with the Act, rather it would give sanction to voluntary disregard.

It is also argued by both Kaiser and EEOC that employers and/or unions may go further than Title VII requires in order to further "public policy" and that, based on this, approval should be given to the program here at issue. Kaiser Brief at 29; EEOC Brief at 37-38.

This argument is also without merit. First, it presupposes the fact that although Title VII does not require the preferential program, it does not forbid it. This is not true as discussed at Section I-A, *supra*.

Second, public policy would not be furthered by the approval of such a program. In stressing the need for findings of constitutional or statutory violations prior to the institution of a preferential program, Justice Powell noted in *Bakke*, 46 U.S.L.W. at 4906-07:

> "Without such findings of constitutional or statutory violations it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another." (Footnote omitted.)

In a like manner, without these findings, which are absent from the present case, there is no public policy to be furthered by the approval of a program which favors one race over another.[5]

Furthermore, a program favoring one racial group of employees, absent an attempt to remedy victims of past specific discrimination, runs counter to public policy. This theory was given voice by Justice Douglas in his dissent in *Defunis v. Odegaard*, 416 U.S. 312, 341-43 (1974), when he noted the divisive effects of racial classifications. These classifications may tend not only to exacerbate racial attitudes among nonminority groups, but may also serve to stigmatize minorities. *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n*, 482 F.2d 1333, 1341 (2d Cir. 1973).

III

KAISER'S PROGRAM DOES NOT MEET THE TITLE VII REQUIREMENTS OF REASONABLENESS

Under Section 706(g), a district court, even after a finding of intentional discrimination, may order only "such affirmative action as may be appropriate."[6] Thus the reme-

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[5] In this respect, it is also necessary to note that in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 778-79 (1976), which both EEOC and Kaiser cite in support of their public policy argument, findings, such as Justice Powell requires, had been made.

[6] Title VII, Section 706(g), 42 U.S.C. § 2000e-5(g), provides in pertinent part:

> "(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may

dies for discrimination, if any, authorized under Title VII are those which equity decrees to be fair and reasonable. Although Section 706(g) is directed toward the courts rather than employers, it seems illogical to allow an employer to do that which a court, operating with full substantive and procedural guarantees, may not accomplish. Therefore, it is clear that in the present case, even were discrimination present, the employer's program to remedy it must be appropriate and reasonable before it can be upheld under Title VII.

In making their arguments in support of the program at issue, both Kaiser and EEOC stress its reasonableness. Kaiser Brief at 51-60; EEOC Brief at 48-54. This emphasis ignores the fact that the program represented a quota reserving fifty percent of the available training positions for minority workers. Racial quotas, whatever their specific percentage, have traditionally been viewed as the least reasonable of all affirmative action devices to be used only as a last remedial resort. *Patterson v. American Tobacco Co.*, 535 F.2d at 274; *Kirkland v. New York Department of Correctional Services*, 520 F.2d 420, 427 (2d Cir. 1975). Under the circumstances of the present case, in which the employer had engaged in no specific discriminatory activity against minorities, resort to this most drastic measure cannot, in and of itself, be considered reasonable.

Nor does the fact that the training program offered new opportunities to nonminorities as well as minorities make

be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate."

the quota any more reasonable. Since selection for the program was to be based on seniority, nonminority workers had the expectation that their justly earned seniority would not be negated. Although *Franks* indicated that this seniority expectation need not always be honored, as discussed in Section II, *supra*, the case at bar is not one in which it could be overlooked for public policy reasons.

This Court has not previously ruled on the validity of promotional quotas which interfere with established seniority expectations. However, lower federal courts have referred to their inequity and have failed to approve them, although they have approved hiring quotas. *Bridgeport Guardians, Inc.*, 482 F.2d at 1340-41. The program in this case is closely related to one dealing with promotions. Therefore, the same reason that lower courts have stressed in relation to the inequity of promotional quotas also applies to the preference here: such quotas adversely affect an identifiable number of nonminority persons who legitimately expected to be treated in a manner which made no racial reference. *Kirkland*, 520 F.2d at 427.

In *Trans World Airlines, Inc. v. Hardison,* this Court discussed an employer's duty under Title VII to take "reasonable" measures to accommodate the religious needs of minority religious groups. The Court found that in the situation presented in that case, in which there was no prior discrimination or no effort to make past discriminatees whole:

> "It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual

rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far." *Id.* at 81.

In the present case, as in *Hardison*, there has been no finding of prior discrimination and no attempt made to make discriminatees whole. Thus, it cannot be concluded that Congress would have considered reasonable or appropriate Kaiser's "affirmative action" program which interfered with the seniority expectations of nonminority workers and denied them access to fifty percent of the available positions.

The argument that Kaiser's program was unreasonable finds further support in this Court's discussion of the remedy ordered for the discrimination which was found in *International Brotherhood of Teamsters v. United States*, 431 U.S. at 372-75. In *Teamsters* specific discriminatory action had been found to exist and the Court approved relief which extended only to putting discriminatees in their "rightful places." However, even in this past discrimination—"rightful place" context, which is not present in the instant case, the Court cautioned that the remedial needs of the minorities must be carefully balanced with the legitimate expectations of employees innocent of wrongdoing. *Id.* at 372. Specifically, the Court stated:

> "Especially when immediate implementation of an equitable remedy threatens to impinge upon the expectations of innocent parties, the courts must 'look to the practical realities and necessities inescapably involved in reconciling competing interests,' in order to determine the 'special blend of what is necessary, what is fair, and what is workable.' " *Id.* at 375 (citations omitted).

Again, if it is important that courts which operate with full substantive and procedural guarantees are constrained to be solicitous of nonminority rights in fashioning minority aid programs, it is even more important that an employer be aware of these rights. Furthermore, if such caution is required when the relief ordered extends only to putting specific victims of proven discrimination in their "rightful places," even more caution would be required when there have been no findings of specific discrimination and no attempt made to aid specific victims.

In the present case, Kaiser has ordered immediate implementation of a program which denies nonminorities access to fifty percent of available training positions. This decision was not based upon the need to remedy specific discrimination against specific victims, but only upon observation of a racially imbalanced work force. Such action ignores the equitable consideration of nonminorities' rights which this Court in *Teamsters* found to be so vital. Without making allowances for these considerations the Kaiser program can be seen as neither reasonable nor appropriate. Therefore, it violates the commands of Title VII.

CONCLUSION

Title VII prohibits employment discrimination against all individuals because of their race. This prohibition means that an employer's program, which gives minorities employment preferences, must be fashioned only to remedy the effects of specific past discriminatory activity and to put the victims of this activity in the places which they would have occupied absent discrimination. Kaiser's program was not designed to achieve these ends. It was not

based upon a finding of prior discrimination of any kind and granted a group preference without any consideration toward putting discriminatees in their "rightful places." The program was, therefore, violative of the individual rights guaranteed to nonminority individuals under Title VII. For these reasons it is submitted that the judgment of the Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

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